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Tourism for Sustainable Mountains Development: A Comparative Law Perspective

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Abstract

This contribution aims to assess whether existing mountain laws at the regional and national levels are equipped to ensure environmental protection in regulating and promoting mountain tourism, in the light of relevant guidance provided by the Convention on Biological Diversity. Two major challenges are identified: ensuring the full and effective participation of mountain communities in decision-making related to mountain tourism development, and the fair and equitable sharing of the benefits arising from sustainable mountain tourism.

Keywords

Mountain law, tourism, comparative law, environmental protection, local communities, benefit-sharing

Tourism for Sustainable Mountains Development:

A Comparative Law Perspective

Elisa Morgera

(in M Onida (ed.), *Environmental Law and Mountains: Lessons from European Ranges*,
Facultas, forthcoming 2010)

Environmental and social concerns related to mountain tourism as a direct and indirect driver of change in mountain biological and cultural diversity can be counterbalanced by the consideration of opportunities offered by sustainable mountain tourism as an activity contributing to the sustainable use of biodiversity.¹ Sustainable mountain tourism can contribute to provide investment for the conservation of biodiversity and mountain culture, and support an integrated and participatory approach to mountain development that serves the well-being of future generations and maintains healthy mountain ecosystems for the long-term future.²

Sustainable mountain tourism can also contribute to meeting current livelihoods needs of mountain communities, who are the guardians of mountain biodiversity, and at the same time among the poorest and most vulnerable communities in the world. Mountain communities often suffer from marginalisation and discrimination. They are disadvantaged in terms of communication and infrastructure, and are significantly affected by environmental degradation and the negative impacts of climate change. They also generally bear the brunt of the negative impacts of mountain tourism in terms of waste generation, security risks, inflation, increased traffic and demands on resources.³

Against this background, law has a significant role to play in striking a fair balance between regulation and promotion of mountain tourism that ensures long-term environmental sustainability and presents realistic and accessible opportunities for income-generation and employment for local communities.

In this contribution, I will address the question of whether mountain law is equipped to ensure environmental protection in the specific context of mountain regions from a comparative perspective, singling out legal approaches and tools that seem particularly promising to this end. The analysis will start by identifying relevant guidance provided by the Convention on Biological Diversity (CBD).⁴ I will then turn to the international obligations emerging from the specialised regimes of the Alpine Convention⁵ and the Carpathians Convention,⁶ and to the instruments used in national mountain-specific legislation. I will

¹ CBD, Note by the Executive Secretary: In-depth Review of the Implementation of the Programme of Work on Mountain Biological Diversity, UN Doc. UNEP/CBD/SBSTTA/14/2, 2010, paras. 2(c) and 11 respectively.

² W Brewer Lama and N Sattar, 'Mountain Tourism and the Conservation of Biological and Cultural Diversity', in M Price, L Jansky and A Iatsenia (eds.), *Key Issues for Mountain Areas* (United Nations University, Tokyo, 2004) 111-148, at 123.

³ Ibid., at 113, 111, 116 and 120; and C Castelein *et al.*, *Mountain and the Law: Emerging Trends*, FAO Legislative Study No. 75rev.1 (Food and Agriculture Organisation of the United Nations, Rome, 2006), at 1.

⁴ Convention on Biological Diversity (Rio de Janeiro, 5 June 1992, in force 6 March 1995).

⁵ Convention concerning the Protection of the Alps (Salzburg, 7 November 1991, in force 6 March 1995—hereinafter, Alpine Convention).

⁶ Framework Convention on the Protection and Sustainable Development of the Carpathians (Kiev, 22 May 2003, in force 4 January 2006—hereinafter, Carpathians Convention).

conclude by identifying two major challenges for national legislators in the area of sustainable tourism development: ensuring the full and effective participation of mountain communities in decision-making on tourism development and fair and equitable sharing of the benefits arising from sustainable mountain tourism activities.

CBD Guidance on Sustainable Mountain Tourism

National legislators may find significant international guidance on sustainable mountain tourism. Agenda 21, for instance, clearly links the promotion of sustainable mountain tourism to the objective of protecting the livelihoods of local communities,⁷ and to the integrated management of mountain areas.⁸ The Convention on Biological Diversity provides a wealth of guidance on how to achieve these two objectives in a mutually reinforcing way through the conservation and sustainable use of mountain biodiversity.

The most pertinent starting point in the multitude of decisions and guidelines adopted by the Parties to the CBD⁹ is the CBD work programme on mountain biodiversity, which contains three key guidelines for ensuring sustainable mountain tourism development. First, local capacity for sustainable tourism management should be strengthened to ensure that benefits derived from tourism activities are shared by indigenous and local communities, while preserving natural and cultural heritage values.¹⁰ Second, sustainable land-use practices, techniques and technologies of indigenous and local communities and community-based management systems should be promoted for the conservation and sustainable use of wild flora and fauna (including pastoralism, hunting and fishing) and agri-biodiversity in mountain ecosystems; and activities of indigenous and local communities involved in the use of traditional mountain-related knowledge, in particular concerning sustainable management of biodiversity, soil, water resources and slope, should be supported.¹¹ Third, the implementation of environmental and social impact assessments should be encouraged at sectoral, programme and project levels, taking into account specificities of indigenous and local communities depending upon mountain ecosystems, by observing the CBD Akwé: Kon voluntary guidelines on cultural, environmental and social impact assessment.¹²

It should be noted from the outset that is a demanding set of guidelines, underpinned by the following key concepts: capacity-building, benefit-sharing, promotion of traditional practices, support and recognition of community-based management systems, and environmental and socio-cultural impact assessments. These are concepts that are used throughout the thematic and cross-cutting areas of work of the CBD, in order to realise an ecosystem-based

⁷ In Report of the United Nations Conference on Environment and Development, UN. Doc. A/CONF.151/26, 1992, Annex II, para. 13(15)(b).

⁸ Ibid., para. 13(6)(e).

⁹ On the question of the legal significance of COP decisions, see J. Brunnée, 'COPing with Consent: Law-making under Multilateral Environmental Agreements' 15:1 *Leiden Journal of International Law* (2002) 1.

¹⁰ CBD decision VII/27, 2004, Annex, para. 1.3.7.

¹¹ Ibid., paras. 1.3.2-1.3.4.

¹² Ibid., para 2.1.9. The Akwé: Kon Guidelines for the conduct of cultural, environmental and social impact assessment regarding developments proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities, provide guidance to Parties on the incorporation of cultural, environmental and social considerations of indigenous and local communities into new or existing impact assessment procedures are contained in CBD Decision VII/16F, 2004.

approach.¹³ Among these legal tools, I argue that benefit-sharing in the context of biodiversity conservation and sustainable use is the most promising to support sustainable mountain tourism. In this context, benefit-sharing as a legal relationship between the State and its communities should be distinguished from benefit-sharing as an inter-State obligation identified in the third CBD objective (Article 1) and as usually linked to access to genetic resources. The dimension of benefit-sharing that is more relevant to sustainable mountain tourism emerges, however, from CBD Article 8(j) as recognition of the contribution of indigenous and local communities' traditional knowledge, innovation and practices to the conservation of biodiversity¹⁴ and—based on a combined reading with CBD Article 10(c)¹⁵—to the sustainable use of biodiversity components, in consideration of the fact that traditional knowledge derives from the customary use of biodiversity components and contributes to ensuring the conservation of biodiversity.¹⁶ Thus, in the context of conservation and sustainable use—the first and second objectives of the Convention—benefits are expected to flow directly to communities and immediately contribute to their livelihoods as a matter internal to one State.¹⁷ This approach is particularly relevant in the context of sustainable mountain tourism because of the hardship experienced by mountain communities and their critical role in ensuring sustainable mountain development.

The mountain biodiversity work programme is thus based on the multiple, mutually reinforcing functions of State-to-community benefit-sharing, namely: a reward for the use of traditional knowledge for the conservation and sustainable use of biodiversity; a broader incentive to ensure the full and effective participation of indigenous and local communities in decision-making and adaptive management of biodiversity, and compensation for the costs and negative impacts of biodiversity conservation or sustainable management activities on indigenous and local communities. As such, the concept of State-to-community benefit-sharing becomes an essential substantive tool that complements procedural guarantees to ensure community involvement in decision-making as a truly bottom-up approach to the sustainable management of living resources.¹⁸

Against this background, it should be stressed that other instruments adopted by the CBD Parties are relevant for the implementation of the programme of work on mountain biodiversity, in that they provide specific guidance on the procedural steps to be taken to realise sustainable tourism development with the participation of mountain communities through benefit-sharing.¹⁹

¹³ The ecosystem-based approach integrates management of land, water and living resources, and it promotes conservation and sustainable use in an equitable way; at the same time it entails a social process: different interested communities must be involved through the development of efficient and effective structures and processes for decision-making and management. See generally, Principles of the Ecosystem approach, CBD Decision V/6, 2000, Annex B.

¹⁴ D Schroeder, 'Justice and Benefit Sharing', in R Wynberg *et al.* (eds) *Indigenous Peoples, Consent and Benefit-Sharing: Lessons from the San Hoodia Case* (Springer, 2009), 11, at 11 in which benefit-sharing is considered a reward for the custodians of biodiversity.

¹⁵ CBD Article 10(c) reads as follows: 'Each Contracting Party shall, as far as possible and as appropriate: [...] Protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements.'

¹⁶ See L Glowka *et al.*, *A Guide to the Convention on Biological Diversity*, IUCN Environmental Policy and Law Paper No. 30 (IUCN, Gland, 1994), at 60.

¹⁷ E Morgera and E Tsioumani, 'The Evolution of Benefit-sharing: Linking Biodiversity and Communities' Livelihoods' (forthcoming 2010) 19:2 *Review of European Community and International Environmental Law*.

¹⁸ *Ibid.*

¹⁹ Morgera and Tsioumani, n. 17 above.

The CBD Guidelines on Biodiversity and Tourism Development, for instance, specifically call for legislative measures on stakeholder participation, approval and control of tourism development, environmental impact assessment (including assessment of cumulative impacts and effects on biodiversity), decision-making processes based on environmental and cultural sustainability guidelines for new and existing tourism development.²⁰ The Guidelines stress the need for involvement and consultation with relevant stakeholders, and especially indigenous and local communities that are or may be affected by tourism development, in the process of reviewing legislation and control measures, assessing their adequacy and effectiveness, and proposing development of new legislation and measures, particularly when addressing access, and/or ownership by communities in relation to tourism development or operations on lands and waters traditionally occupied or used by them and other legally established rights.²¹ In addition, concerned local communities should be involved in environmental and socio-economic impact assessment, and their traditional knowledge should be acknowledged and considered in particular tourism projects that affect their sacred sites or lands and waters traditionally occupied or used by them.²² The Guidelines list a series of possible benefits arising from tourism and the conservation of biodiversity to be shared with local communities, such as job creation, participation in tourism enterprises and projects, education, and direct investment opportunities.²³ They also call for providing alternative and supplementary ways for communities to receive revenue from biodiversity.²⁴

The CBD Addis Ababa Principles and Guidelines on the Sustainable Use of Biodiversity²⁵ are also relevant for present purposes, particularly because they link the inclusion of traditional knowledge in biodiversity management planning with benefit-sharing, which should be applied also when planning mountain tourism development. Principle 4(a) states that adaptive management should be practiced based on science and local and traditional knowledge, according to a rationale underlining that ‘in many societies traditional and local knowledge has led to much use of biological diversity being sustainable over long time-periods without detriment to the environment or the resource’, thus considering the incorporation of such knowledge into modern use systems critical to avoiding inappropriate use and enhancing sustainable use of biodiversity components. Accordingly, adaptive management plans are to incorporate ‘systems to generate sustainable revenue, where the benefits go to indigenous and local communities and local stakeholders to support successful implementation.’²⁶ The operational guidelines to Principle 4 recommend adopting policies and regulations that ensure that indigenous and local communities and local stakeholders who are engaged in the sustainable use of a resource receive an equitable share of any benefits derived from that use. It also recommends promoting economic incentives that will guarantee additional benefits to those involved in the management of any biodiversity components, such as support for co-management, job opportunities for local peoples, or equal distribution of returns amongst locals and outside investors. Notably, the guidelines use benefit-sharing as a means to ensure local stakeholder participation also in projects led by foreign investors.

²⁰ CBD Decision VII/14, 2004, Annex, para. 32.

²¹ Ibid., paras. 31 and 33.

²² Ibid., para. 39.

²³ Ibid., para. 23.

²⁴ Ibid., para. 43.

²⁵ Addis Ababa Principles and Guidelines for the Sustainable use of Biodiversity, adopted by CBD Decision VII/12, 2004, Annex II.

²⁶ Ibid., operational guidelines to Principle 4.

The CBD Guidelines on the incorporation of biodiversity-related issues into EIAs are equally relevant for present purposes, as they call for an assessment of: inter-related socio-economic, cultural and human-health impacts; changes to access to and rights over biological resources; social change processes as a result of a proposed project; sensitive species that may be important for local livelihoods and cultures; activities leading to displacement of people; and impacts on societal benefits and values related to land-use functions.²⁷

Finally, the Akwé: Kon Guidelines are particularly relevant for sustainable mountain tourism, as explicitly recognised by the CBD work programme on mountain biodiversity. The Akwé: Kon Guidelines recommend that the cultural, environmental and social impact assessment reflects ‘a balance between economic, social, cultural and environmental concerns, on the one hand, while, on the other hand, maximising opportunities for the conservation and sustainable use of biological diversity, the access and equitable sharing of benefits and the recognition of traditional knowledge, innovations and practices in accordance with Article 8(j) of the Convention, and should seek to minimise risks to biological diversity.’²⁸ Specifically, they provide that ‘[p]roposed developments on sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities should ensure that tangible benefits accrue to such communities, such as payment for environmental services, job creation within safe and hazard-free working environments, viable revenue from the levying of appropriate fees, access to markets, and diversification of income-generating (economic) opportunities for small and medium-sized businesses.’²⁹ The Guidelines thus suggest that impact assessments can be used as tools that contribute to the equitable sharing of benefits, by identifying and weighting expected cultural, social and environmental costs and impacts of proposed developments, as well as communities’ opportunities and traditional contributions to conservation and sustainable use.

What emerges from this overview of relevant CBD guidelines is the expectation that States fully involve communities in the governance of biodiversity conservation and sustainable use, encouraging and rewarding them for their participation in decision-making through legal recognition and promotion of community management systems, provision of capacity-building services, making available employment or other income-generation opportunities, and ultimately giving precedence to community-based mechanisms for conservation and sustainable use or, when the latter is not possible, sharing economic revenues derived from the conservation and sustainable use of biodiversity (such as park entrance fees, licences fees for wildlife watching or sustainable hunting, etc.) that are accrued by the State or outside investors. This is in recognition of the fact that community participation in decision-making is not *per se* a reward for communities, but may rather entail costs and risks for communities. So procedural guarantees should be coupled with substantive legal provisions requiring authorities to recognise and support communities’ sustainable practices, to provide guidance to improve the environmental sustainability of community practices, and proactively identify opportunities for better/alternative livelihoods in these endeavours, with a view to facilitating understanding of, and compliance with, the law. Benefit-sharing may also act as compensation through payments for ecosystem services, diversification of income-generating opportunities, and other mitigation measures, when the interests of biodiversity protection are in an irreconcilable conflict with the legitimate interests of communities, and the former need to prevail. To this end, indispensable procedural steps include undertaking cultural, social and

²⁷ CBD Decision VI/7, 2002, Annex.

²⁸ Akwé: Kon Voluntary Guidelines, n. 12 above, para. 56.

²⁹ *Ibid.*, para. 46.

environmental impact assessments with the full engagement of relevant communities and integrating traditional knowledge and community concerns in management plans.³⁰

It is worth noting that many of these legal tools find recognition and support also in other instruments adopted outside the framework of the Convention on Biodiversity. The 2002 Declaration on Eco-tourism, for instance, emphasises the inclusion of local and indigenous communities in the planning, development and operation of eco-tourism (that is, tourism that contributes actively to the conservation of natural and cultural heritage, and contributing to their well-being, social, economic and environmental benefits and costs to the environment and local communities, their natural resources and traditional knowledge and practices).³¹ The Declaration supports the use of participative planning to allow local communities, in a transparent way, to define and regulate at the local level the use of their areas, including the right to opt out of tourism development,³² and of a wide consultation process in the development of national, regional and local ecotourism policies and development strategies with those who are likely to become involved in, affect, or be affected by ecotourism activities.³³ Governments are also invited to consider as one option the reallocation of tenure and management of public lands, from extractive or intensive productive sectors to tourism combined with conservation, wherever this is likely to improve the net social, economic and environmental benefit for the community concerned.³⁴ The Declaration further provides specific guidance on public participation related to eco-tourism that may be relevant in the mountain regions, namely: using in the framework of regulatory and monitoring mechanisms objective sustainability indicators jointly agreed with all stakeholders and environmental impact assessment studies to be used as feedback mechanism; and making the results of monitoring available to the general public.³⁵

The next question is whether existing mountain-specific international treaties also reflect similar approaches to sustainable mountain development and sustainable mountain tourism more specifically.

Tourism and the Mountain Conventions

The Alpine Convention stresses the need to restrict tourism activities harmful to the environment, and harmonise tourism activities with ecological and social requirements, in particular by setting aside quiet areas.³⁶ On this basis, the 1998 Protocol on Tourism to the Alpine Convention³⁷ provides pragmatic and specific guidance (and in the cases in which mandatory language is used, obligations) on tourism development in mountain areas. It should be noted that its relevance is not necessarily limited to its State parties, as it can be

³⁰ Morgera and Tsioumani, n. 17 above.

³¹ Québec Declaration on Eco-tourism, 22 May 2002, preamble. It was adopted by the representatives of 132 countries participating in the World Ecotourism Summit (Québec City, Canada, 19-22 May 2002), under the auspices of the UN Environment Programme and the World Tourism Organisation.

³² *Ibid.*

³³ *Ibid.*, para. 1.

³⁴ *Ibid.*, para. 2.

³⁵ *Ibid.*, para. 4.

³⁶ Alpine Convention, art. 2(2)(i).

³⁷ Protocol for the implementation of the Alpine Convention of 1991 in the field of tourism (Bled, 16 October 1998, in force 18 December 2002—hereinafter, Alpine Tourism Protocol).

considered as a model for other mountain regions.³⁸ Specifically, the Protocol aims to contribute to sustainable development ‘by encouraging environmentally-friendly tourism’ taking into account the interests of both local communities and tourists.³⁹ Among its provisions, the following provide useful, detailed guidelines for national legislators:

- Environmental integration: Parties undertake to take a holistic approach to policy and legislation on tourism, regional planning, transport, agriculture, forestry, nature protection, water and energy, with a view to reducing any negative or contradictory effects;⁴⁰
- Institutional coordination and decentralisation which focuses on regional and local authorities: parties are required to define the best level of coordination and cooperation between the institutions and regional authorities directly concerned to encourage solidarity of responsibility in applying tourism policies, and regional and local authorities are mandated to participate in preparing and implementing such policies;⁴¹
- Tourism management: parties are required to support the preparation and implementation of ‘guidelines, programmes and sectoral plans’,⁴² through, *inter alia*, assessments of socio-economic and environmental impacts;⁴³
- Specifically linking incentives for tourism development to compliance with ecological requirements and support to environmentally-friendly tourism and the promotion of cultural and natural heritage;⁴⁴
- Encouraging the control of tourist flows⁴⁵ and commitment to the establishment of ‘quiet areas’ where no tourism facilities can be developed;⁴⁶
- Providing specific environmental sustainability requirements for ski lifts, tourist traffic and transport, ski slopes, artificial snow machines, sporting activities and landing by air.⁴⁷

These provisions seem to be in line with the CBD guidelines related to adaptive management plans, and environmental and social impact assessments discussed in the previous section. Existing references to the need to take into account the interests of communities and to ensure decentralisation may be considered a step in the right direction in facilitating participation of mountain communities in decision-making at the local level. Explicit provisions encouraging public participation, and specifically the involvement of local communities in decision-making and planning and benefit-sharing, are however not included in the text of the Convention. The lack of such detailed provisions thus contributes to explain the perception of the Alpine Convention as a top-down instrument.⁴⁸ This approach seems to be reflected throughout the Protocols adopted under the Convention, with the exception of a provision calling for the direct involvement of farmers in decision-making in the Protocol on Mountain

³⁸ Castelein *et al.*, n. 3 above, at 9.

³⁹ Alpine Tourism Protocol, art. 1.

⁴⁰ *Ibid.*, art. 3.

⁴¹ *Ibid.*, art. 4.

⁴² *Ibid.*, art. 5(1).

⁴³ *Ibid.*, arts. 5(2)(a)-(b) and 9.

⁴⁴ *Ibid.*, art. 6(4).

⁴⁵ *Ibid.*, art. 8.

⁴⁶ *Ibid.*, art. 10.

⁴⁷ *Ibid.*, arts. 12-15.

⁴⁸ M Onida, ‘A common approach to mountain specific challenges: The Alpine Convention,’ presentation at the international conference ‘Environmental Protection and Mountains: Is Environmental Law Adapted to the Challenges Faced by Mountain Areas?’ (27-28 April 2010, Innsbruck, Austria).

Agriculture.⁴⁹ The lack of State support for a strong participatory stance in the implementation of the Alpine Convention and its Protocols may also be reflected in the lack of a protocol on population and culture,⁵⁰ and the general language of the Declaration on Population and Culture, which was adopted instead of a protocol: it merely referred in general terms to the recognition of the important role of civil society and the promotion of transparency in the relationship between the public administration and the population and public participation in public affairs.⁵¹ This language does not support a more proactive substantive legal approach to effectively engaging mountain communities in sustainable mountain tourism.

In turn, the Carpathians Convention, which is a more recent instrument successive to the conclusion of the CBD, explicitly links in its operative text the promotion of sustainable tourism with the need to provide benefits to the local people, based on the exceptional nature, landscapes and cultural heritage of the Carpathians.⁵² Its Protocol on the Conservation and Sustainable Use of Biodiversity and Landscape Diversity, however, seems to have weakened these references. It points to ‘stakeholder’ involvement in management planning,⁵³ rather than calling attention to mountain communities more specifically. It also makes reference to the use of traditional knowledge,⁵⁴ without mention of benefit-sharing.

There seems, therefore, to be a mismatch between the general guidance of Agenda 21 and the precise guidance provided by the CBD on sustainable mountain tourism and the general approach and more detailed provisions that can be found in the regional mountain conventions that have been concluded so far. This can certainly be explained by the fact that both conventions were concluded before the adoption of the CBD programme of work on mountain biodiversity: this is not the case, though, for the Alpine Declaration on Population and Culture and the Carpathians Protocol. It remains to be assessed whether national law has been more significantly influenced by the CBD work programme on mountain biodiversity and other relevant guidelines.

A brief assessment of existing national solutions

A review of national legislation on sustainable mountain development⁵⁵ carried out by the Food and Agriculture Organisation of the United Nations (FAO) reveals that almost all national laws specifically devoted to mountains contain explicit provisions on tourism.⁵⁶ These provisions have generally either the aim of regulating tourism development in

⁴⁹ Protocol for the implementation of the Alpine Convention in the field of mountain agriculture (Chambery, 20 December 1994, in force 18 December 2002), art. 4.

⁵⁰ Which was foreseen at art. 2(2)(a) of the Alpine Convention.

⁵¹ Declaration on Population and Culture (2006), chapter I., para. 4.

⁵² Carpathians Convention, art. 9(1).

⁵³ Protocol on Conservation and Sustainable Use of Biological and Landscape Diversity to the Framework Convention on the Protection and Sustainable Development of the Carpathians (Bucharest, 19 June 2008, not yet in force), art. 17.

⁵⁴ *Ibid.*, art. 23.

⁵⁵ The term has been defined as ‘a regionally-specific process of sustainable development that concerns both mountain regions and populations living downstream or otherwise dependent on these regions’. See M Price, ‘Introduction: Sustainable mountain development from Rio to Bishkek and Beyond’, in Price, Jansky and Iatsenia, n. 2 above, 1-17, at 5-6, which stresses compensation for sustainable management of mountain ecosystems by downstream populations and creation of new livelihood opportunities.

⁵⁶ Castelein *et al*, n. 3 above, at 31.

mountains or that of providing financial and other support for promoting tourism development.

Restrictions on tourism development to ensure environmental sustainability can be found, for instance, in the French Act on Mountain Development and Protection, which calls upon local authorities to monitor the implementation of tourism development operations and to conclude contracts with tourism promoters to ensure supervision of tourism facilities and the management of ski lifts.⁵⁷ In addition, mountain tourism developments are regulated by specific planning rules, to ensure respect of the quality of the sites and the natural balance.⁵⁸

More commonly, however, national laws provide incentives for tourism development in mountain regions. In Georgia, preferential loans are made available for the promotion of mountain tourism to develop recreational and sports amenities and to protect and restore rural, historical and natural monuments.⁵⁹ In Bulgaria, institutional support through central and local authorities that are specifically tasked to foster the development of tourism in mountain regions, is coupled with the provision of subsidies to put in place programmes for increasing land available for thermal tourism and agri-tourism, fostering commercial and handicraft activities connected with mountain tourism, and providing basic training and refresher courses for mountain tourism personnel.⁶⁰ In Romania, performance-based incentives have been put in place: hotel certification rewards owners with the allocation of land from local authorities and priority in obtaining building permits.⁶¹ In addition, the development of agri-tourism is favoured by exempting agri-tourism farms from the payment of land taxes and turnover taxes for the first five years.⁶²

What clearly emerges, therefore, is national legislators' emphasis on the economic and sometimes environmental dimensions of mountain tourism, with little, if any, attention to mountain communities and related socio-cultural dimensions that are paramount for the conservation and sustainable use of mountain biodiversity as well as for the flourishing of mountain tourism itself. An analysis of these tourism-specific provisions, however, may not suffice to understand whether a fair balance between regulation and promotion of mountain tourism has been achieved, or whether incentives are effectively linked to compliance with environmental requirements.

Provisions on mountain-specific institutions, for instance, may provide significant procedural guarantees for mountain communities' involvement in the support and control of tourism development in mountain areas: national and local mountain boards may facilitate a balanced discussion of economic, environmental and social impacts related to tourism development in a specific mountain area due to the inter-sectoral representation and the varied expertise of the board members. In addition, multi-stakeholder boards may allow for the regular inclusion of mountain communities representatives, as well as environmental and cultural heritage

⁵⁷ Act 85-30, 9 January 1985, article 42 (see Castelein *et al*, n. 3 above, at 69).

⁵⁸ Act 2005-157 on the development of rural lands, 23 February 2005, art. 190 (see Castelein *et al*, n. 3 above, at 70).

⁵⁹ Act of 8 June 1999 on the socio-economic and cultural development of mountain regions, art. 3 (see Castelein *et al*, n. 3 above, at 78).

⁶⁰ Law on the development of mountain regions in the Republic of Bulgaria, 1993, arts. 5 and 6(1)(2) (see Castelein *et al*, n. 3 above, at 56).

⁶¹ Mountains Act of 14 July 2004, art. 18 (see Castelein *et al*, n. 3 above, at 100).

⁶² *Ibid.*, art. 19.

NGOs in decision-making related to mountain tourism.⁶³ Other provisions on regular public participation in decision-making, environmental impact assessments and planning may act as preconditions for ensuring the environmental and social sustainability of mountain tourism.

Similarly, provisions on the protection, dissemination and transmission of the culture of mountain communities may be very much related to the development of sustainable mountain tourism. For instance, the French Act on Mountain Development and Protection subjects land occupancy decisions to the respect of typical landscapes and areas of cultural and natural heritage, which were subsequently qualified by the introduction of exceptions to the restrictions on building constructions in order to bolster tourism.⁶⁴ This may, however, be a rather top-down approach if communities are not involved in the decision-making process.

Provisions on raising living standards of mountain communities, by granting them priority rights in local employment and training opportunities or in the allocation of harvesting rights over natural resources⁶⁵ may implement a benefit-sharing approach to sustainable mountain development. The law of North Ossetia-Alania, for instance, grants privileges to mountain communities, including priority rights in natural resource use including for tourism, mountaineering and excursion purposes.⁶⁶ Different legal provisions can also support benefit-sharing from sustainable tourism development. A tourism or bed tax would allow funds collected to be used for community development needs. Alternatively, rotation of visitors among service providers could be required or encouraged, and/or selecting training of non-lodge-owning community members as guides could be favoured. In addition, a broader and more diversified economic base in mountain regions could be stimulated through technical and start-up financial assistance, specifically targeting local communities.⁶⁷ Further options include requiring by law the sharing of economic revenue from touristic activities to the benefit of communities: in Kyrgyzstan, for instance, a community-based tourism fund has been created with 5% of tourism operators' charges to support the development of community-based tourism. A more empowering option is to provide particular support or priority to community-based tourist activities: in Pakistan, community-based trophy hunting schemes have been used to increase the touristic attraction of remote areas, based on planning, management and benefit-sharing involving local communities. Other interesting examples include the conclusion of conservation contracts for the provision of training and marketing assistance in ecotourism to communities in exchange for communities' commitment to carry out panda patrols in China, or facilitating interactions between foreign ecotourism operators and local community-based tourism operators in Kyrgyzstan.⁶⁸

While not all these initiatives may be grounded in law, it should be stressed that a legal basis is more suitable to create a long-term stake in sustainable mountain tourism for mountain communities, by providing legal in the face of changing governments or changing government priorities, so as. Such legal basis may be provided in mountain-specific legislation, or in general laws on environmental protection and mountain-specific laws: legal

⁶³ For this and other examples of specialised mountain institutions created by national law, see Castelein *et al*, n. 3 above, at 20-23.

⁶⁴ *Ibid.*, at 26.

⁶⁵ *Ibid.*, at 24-25.

⁶⁶ Law No. 30-z of 1998 on mountain territories of the Republic of North Ossetia-Alania (Russian Federation), art. 11, read in conjunction with art. 14 (see also Castelein *et al*, n. 3 above, at 25-26). Similar legal provisions can be found in arts. 12 and 15, Kyrgyzstan's Law No. 151 on mountain territories of 2002.

⁶⁷ Brewer Lama and Sattar, n. 2 above, at 120.

⁶⁸ *Ibid.*, at 132-137.

provisions on the protection of mountain forests, soil and waters⁶⁹ may, for instance, provide incentives for particularly environmentally beneficial tourism activities (such as those leading to the rehabilitation of degraded sites) carried out by local communities, or create opportunities for these communities to monitor tourism impacts on the environment.

Challenges for national laws on sustainable mountain tourism

Overall, it seems that two elements should be embodied in national legislation to ensure sustainable mountain tourism that contributes to environmental protection and human well-being, particularly that of vulnerable and disadvantaged mountain communities: procedural guarantees for community involvement in decision-making and substantive provisions on benefit-sharing.

Procedural guarantees for adaptive and participatory sustainable mountain development can already be found in mountain-specific legislation, as well as in general environmental laws applicable to mountain tourism. In the specific case of the EU Member States that are parties to the Alpine Convention, for instance, EU legislation on public participation in environmental decision-making would serve this purpose, including participation in licensing and environmental impact assessment.⁷⁰ In other regions, multi-stakeholder institutions, participatory management planning, and socio-cultural and environmental impact assessments that take in particular account the possibility of cumulative impacts on biodiversity are all essential ingredients to allow a holistic application of the various rules relevant for sustainable mountain development.

Even when legal provisions exist, however, they may not be developed sufficiently. The FAO review, for instance, points to a lack of national legal provisions on ensuring compatibility of tourism development and the protection of mountain cultures, or on gender equity issues.⁷¹ Another example is provided by EU legislation on environmental impact assessment legislation, which do not seem well equipped to fully consider biodiversity considerations and provides little support for an assessment of socio-cultural issues that are related to the conservation and sustainable use of biodiversity.⁷² In that respect, the CBD Guidelines for biodiversity-inclusive assessments and the Akwé: Kon Guidelines for the conduct of cultural, environmental and social impact assessment may provide useful additional guidance that can be adapted by national legislators to the specific context of mountain tourism.

The most significant challenge for national legislation on sustainable mountain development is, however, ensuring substantively the fair and equitable sharing of benefits arising from sustainable mountain tourism with mountain communities. That is, to ensure that benefits from mountain tourism reach poorer households who lack capital to invest in, and skills

⁶⁹ Ibid., at 27-29.

⁷⁰ Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC.

⁷¹ Castelein *et al*, n. 3 above, at 25-26.

⁷² European Commission, Report on the application and effectiveness of the EIA Directive (Directive 85/337/EEC, as amended by Directives 97/11/EC and 2003/35/EC), COM(2009) 378, 23 July 2009, at 9.

relevant to, tourism-based enterprises,⁷³ consistently and in adequate proportions, as well as ensuring that tourism impacts on mountain biodiversity and culture be monitored, minimised and managed with a portion of tourism revenue reinvested in restoration; and that mountain communities should be active and responsible participants in undertaking tourism development.⁷⁴ Legal provisions supporting community-based tourism may be particularly significant in this respect: national legislation already incorporates some interesting tools to this end. More challenging is ensuring benefit-sharing in situations in which outside and foreign investors are mainly involved in mountain tourism: a legal basis is necessary to ensure that benefits arising from investor-driven tourism development reach also local communities. In addition, benefit-sharing should specifically reward mountain communities for the use of traditional knowledge used for tourism purposes, as well as compensate communities for the negative impacts of tourism activities at the local level.⁷⁵

Overall, substantive provisions on benefit-sharing and procedural guarantees for mountain communities' involvement in decision-making at all levels related to mountain tourism should foster a true partnership between authorities, investors and local stakeholders as an essential approach for reconciling human and environmental protection needs, as called for by the ecosystem approach.⁷⁶ The need for such an approach will become increasingly felt as climate change⁷⁷ impacts disproportionately on mountains and mountain communities: benefit-sharing may be needed, on the one hand, to reward the use of mountain communities' traditional knowledge that contributes to adaptation efforts. On the other hand, technology for low-carbon tourism may only be in the hands of outside investors with the risk of marginalising community-based tourism efforts, unless benefit-sharing is used to ensure communities' involvement in investor-driven tourism development or compensation for such exclusion.

In conclusion, as Agenda 21 pointed out almost twenty years ago, communities' livelihoods and integrated environmental management need to go hand in hand in ensuring that tourism truly contributes to sustainable mountain development. National legislation still faces critical challenges in reaching that objective, particularly in systematically providing substantive and proactive legal tools for benefit-sharing, although international guidance is abundant in this respect.

⁷³ Brewer Lama and Sattar, n. 2 above, at 120.

⁷⁴ Ibid., at 112.

⁷⁵ See generally Morgera and Tsoumani, n. 17 above.

⁷⁶ L Krämer, 'Role and Place of Mountainous Areas in the Development of Nature Conservation Legislation', presentation at the international conference 'Environmental Protection and Mountains: Is Environmental Law Adapted to the Challenges Faced by Mountain Areas?' (27-28 April 2010, Innsbruck, Austria).

⁷⁷ P Quillaq, 'The Action Plan on Climate Change in the Alps: Legal Stumbling Blocks to a Joint Implementation by the Parties,' presentation at the international conference 'Environmental Protection and Mountains: Is Environmental Law Adapted to the Challenges Faced by Mountain Areas?' (27-28 April 2010, Innsbruck, Austria).